85-1425

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

REPUBLICAN PARTY OF HAWAII, TORAKI MATSUMOTO and RUDY PACARRO,

Appellants,

vs.

PATSY MINK, MARILYN BORNHORST and RAYMOND K. PUA, CITY CLERK, CITY AND COUNTY OF HONOLULU,

Appellees,

APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is it permissible for a Court sua sponte to conjure up important governmental interests in an effort to satisfy the test in Anderson v. Celebrezzee, 460 U.S. 780 (1983), interests which the State Court asserts justify an absolute ban on an official who has been recalled in a no fault recall election from running to fill the vacancy caused by the recall, when no such governmental interests whatsoever were advanced by the government or by any other litigant?

2. If it is permissible for the Hawaii Supreme Court on its own to create such "governmental interests", what are the due process implications where Appellants were first confronted with those alleged

"governmental interests" only when the Court issued its written opinion after already having entered its judgment?

3. If it is permissible for the Hawaii Supreme Court on its own to create "governmental interests" to justify the ban on Appellants' running in the special election, was the Hawaii Supreme Court correct with respect to the following:

a. Was the Hawaii Supreme Court correct in its determination that a complete an on Appellants' running in the special election is an injury of "virtually no character or magnitude"?

b. Was the Hawaii Supreme Court correct when it suggested that the mere possibility of being elected by a

plurality in the special election justifies banning Appellants from running in that election?

c. The Hawaii Supreme Court suggests that unless the electorate is prevented from voting for previously recalled official, the process of recall has no efficacy because they might be re-elected. Is "because you might win the election" a legitimate reason to ban someone from running for an office?

d. The Hawaii Supreme Court states that the implicit ban which it finds in the Charter is a "general one and must be construed so as to apply to all vacancies, no matter how created." Does the Court-imposed need for a ban on running after

impeachment justify a ban on running after a no-fault recall?

4. Does an Emergency Petition for Writ of Mandamus predicated solely upon State law and Motion to Dismiss the Emergency Petition for Writ of Mandamus wherein Respondent Council-members in the State Court proceeding raised the Federal constitutional issue in their Motion to Dismiss without expressly waiving their right to return to Federal Court constitute voluntary and full litigation of their Federal constitutional claim under England v. Medical Examiners, 375 U.S. 411 (1964) and Government Employees v. Windsor, 353 U.S. 364 (1957)*

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*The Respondents in the State Court proceeding

were Toraki Matsumoto, Rudy Pacarro and Raymond K. Pua, City Clerk, City and County of Honolulu. The Intervenor below was Republican Party of Hawaii. Petitioners below were Patsy Mink and Marilyn Bornhorst, in their official capacity as councilmembers of the City and County of Honolulu, State of Hawaii on behalf of themselves and all other voters of the City and County of Honolulu.

28 U.S.C. sec. 2403 (b) may be applicable and therefore, service shall be made upon the Attorney General of the State.

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OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii is reported at 68 Haw. ___,

___ P.2d ___ (1985) and is set forth in the Appendix infra, pp. A-1 - A-15. (hereinafter "App. A ").

JURISDICTION

This is an appeal from an Original Proceeding for a Writ of Mandamus commenced in the Supreme Court of the State of Hawaii.

Appellees Patsy Mink and Marilyn Bornhorst filed an Emergency Petition for Writ of Mandamus in the Supreme Court of the State of Hawaii on November 20, 1985. Appellants Toraki Matsumoto and Rudy Pacarro moved to dismiss the Petition on November 25, 1985. The Hawaii Supreme Court entered its Order Granting Writ of Mandamus on November 26, 1985. App. A-16 - A-18. That Order constitutes a final judgment or decree within

the meaning of 28 U.S.C. § 1257. Appellants filed their Notice of Appeal to the Supreme Court of the United States with the Supreme Court of the State of Hawaii on November 27, 1985. App. A-19 - A-23. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1257(2).

CONSTITUTION AND STATUTES AND ORDINANCES INVOLVED[1]

U.S. CONST. amend. I

U.S. CONST. amend. XIV, art. 1.

42 U.S.C. § 1983

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[1] The Constitutional provisions, statutes and ordinances are set forth in their entirety in the App., infra, A-30 - A-41.

Sections 3-102, 3-105(b), 12-103, 12-201 and 12-202 of the Revised Charter of the City and County of Honolulu 1973 (1983 edition).

STATEMENT OF THE CASE

Toraki Matsumoto and Rudy Pacarro served as Democratic Councilmen on the Honolulu City Council for seventeen and fifteen years respectively. Running as Democrats in the last general election, Matsumoto faced only token opposition and Pacarro ran unopposed. Their public support is substantial. For the last twenty years the Democratic Party has been overwhelmingly the dominant party in Hawaii much like the Democratic Party was in the Old South. De facto the Republican Party is a minor party in Hawaii.

In 1984, Honolulu voters elected a Republican mayor for the first time in 20

years. In May of 1985, Matsumoto, Pacarro and a third councilman, George Akahane, changed their party affiliation from Democrat to Republican. After joining with the two existing Republican members of the City Council, they created a five person Republican majority on the nine member City Council. For the first time since World War II the Republicans controlled both the Mayor's office and the City Council. The new Republican majority ousted Patsy Mink as chairperson of the Council. In June, 1985, Patsy Mink mobilized the Democratic Party machine in a recall effort aimed at the three new Republican councilmen.

Recall of elected city officials is governed by Sections 12-101 through 12-103 of

the Revised Charter of the City and County of Honolulu 1973 (1983 edition) ("Charter" or "RCH"). App. A-32 - A-38. The Charter permits "no-fault" recall, i.e., there need be no misfeasance, malfeasance, or non-feasance. In that regard, Honolulu's recall law is unusual. The only basis for the recall asserted in the recall petitions was the change in party affiliation from Democrat to Republican. In July, 1985 petitions bearing an apparently sufficient number of signatures to satisfy the Charter requirements (10% of the votes cast in the district in the last council election) were submitted to Appellee Raymond Pua, the City Clerk. The petitions were accepted and certified by Pua and the recall election was set for October 5, 1985.

On August 12, 1985, Matsumoto, Pacarro and Akahane filed a complain' in the U.S. District Court for the District of Hawaii (Civil No. 85-0950) challenging the constitutionality of a part of section 12-103 of the Charter which was viewed by all as the only restriction in the City Charter on running for office after recall:

> No person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation.

Although focused on what was viewed to be the only Charter restriction on running again for City Council, the complaint generally attacked the constitutionality of

EDITOR'S NOTE

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restrictions on running for office after recall. The District Court entered its "Decision and Order" on September 3, 1985 in which , although Judge King characterized the two year ban on running for office as "Draconian" and the two year ban on appointive office as "especially capricious", he felt that the constitutional problems raised by the two year ban would not be ripe unless one of the three councilmen lost the recall election. While retaining jurisdiction and declining to abstain, the District Court left disposition of the constitutional claim to await the results of the October 5, 1985 recall election.

On Saturday, October 5, 1985, all three councilmen were recalled, Pacarro by 81 votes out of 13,280 votes cast and Matsumoto

by 958 votes out of 16,891 votes cast.

The next Monday, October 7, 1985, the recalled councilmen renewed their request for the U.S. District Court to rule on the constitutionality fo the two year ban. On October 15, 1985, the District Court sitting en banc (Senior Judges Pence and Judge King with Chief Judge Harold Fong) filed its "Decision and Order Denying Temporary Restraining Order," Judge Fong dissenting, which was subsequently clarified as a denial of Plaintiffs' request for a preliminary injunction. In issuing their decision, they sidestepped the constitutional question altogether.

On October 18, 1985, Judge Fong's vigorous dissent was filed. In his dissent

Judge Fong addressed the "balancing test" announced by this Court in Anderson v. Celebrezzee, 460 U.S. 780, 788-89 (1983) (hereinafter "Anderson") and, after concluding that the two year ban was likely to be found unconstitutional, upon application of that test, he stated that he would have granted the injunction.

Pacarro, Matsumoto and Akahane appealed the denial of their injunction to the Ninth Circuit Court of Appeals on October 23, 1985. On October 24, 1985, they filed a Motion for Injunction Pending Appeal. Following argument on October 25, 1985, Circuit Judges Kennedy, Hug and Skopil entered an Order on October 28, 1985 in which they concluded that the two year ban was so likely to be unconstitutional that its enforcement should

be enjoined. The October 28, 1985 Ninth Circuit Order was reduced to a formal opinion on November 4, 1985. Matsumoto, et al. v. Pua, et al., 775 F.2d.1393 (1985). In that opinion at 1395-96, the Ninth Circuit recognized that Matsumoto and Pacarro would suffer irreparable injury if they were to be denied the right to run in the special election, and it subsequently developed that they were entitled to run. The Ninth Circuit Court reached its conclusion after analyzing the two year ban in terms of the "balancing test" found in Anderson, supra, 460 U.S. at 788-89. The Court addressed the only governmental interest anyone had raised to justify the two-year ban on running for City office after recall; i.e., that a ban would

promote officeholder responsiveness to the electorate. Rejecting that argument the Court found that such an interest is served by recall itself. 775 F.2d at 1397.

On October 29, 1985, the District Court entered an "Order Granting Plaintiffs' Motion for Preliminary Injunction" enjoining City Clerk Raymond Pua from refusing to place Plaintiffs' names upon the ballot by relying upon the two-year penalty provision. On that same day, which was the last day to file nomination papers to run in the special election, Toraki Matsumoto and Rudy Pacarro filed to run in the special election to regain their lost seats. Although provided for in the statute, no one filed an administrative challenge to the filing and acceptance of their nomination forms, and

their names were printed on the ballots. The election was scheduled for November 30, 1985.

On October 31, 1985, the Democratic Party of Hawaii filed a new Complaint in the State trial court (First Circuit Court) alleging that even though the ban was unenforceable, nevertheless the City Charter should be interpreted to find an implicit ban on recalled officials running in any election held during the balance of the term to fill the positions from which they were recalled. The Democratic Party's Motion for Temporary Restraining Order seeking to enjoin the mailing of absentee ballots containing the names of Matsumoto and Pacarro was heard on November 5, 1985 and was denied by the trial court on November 7, 1985.

That same day, the Democratic Party of Hawaiil filed a Motion for Preliminary Injunctive and Declaratory Relief in the state court and informally asked for the trial on the merits to be set for the next day even though the complaint was only eight days old. Not surprisingly the trial court declined to set the case for trial the next day. No formal request was made to the trial court for a more reasonable early trial date. Only four hours after filing their Motion for Preliminary Injunction in the trial court, the Democratic Party of Hawaii filed a Petition for Writ of Mandamus in the Supreme Court of the State of Hawaii seeking a writ to compel the lower court to try the case immediately. Two hours later they asked the State Supreme Court for an ex parte

Temporary Restraining Order ("TRO") which was granted without hearing on Friday, November 14, 1985. The TRO enjoined Pua from mailing the absentee ballots containing Matsumoto's and Pacarro's names.

The recusal of Justice Wakatsuki (Democratic Majority Leader in the State House of Representatives for several years), Justice Hiyashi (close relative of Democratic Governor Ariyoshi's wife) and Chief Justice Lum (former high ranking official in the Democratic Party of Hawaii) was suggested. All but Justice Wakatsuki declined to recuse themselves.

A motion to dissolve the TRO was filed and following argument on November 18, 1985, the Hawaii Supreme Court "conditionally"

dissolved the TRO by requiring sua sponte that a notice, which no party to the proceeding has asked for, be mailed with each ballot

> "...to the general effect that the eligibility of the applicable recalled councilmember (Respondents Matsumoto and Pacarro as the case may be) as a candidate for election is in litigation, and that the candidate's name could be ordered stricken from the ballot by the court."

Matsumoto and Pacarro moved to Dismiss the Petition and delete the requirement of mailing of "warning notices" with the absentee ballots. The Hawaii Supreme Court apparently recognized that the "notice" requirement which the Court had imposed on its own also raised serious procedural, constitutional and practical problems which would likely invalidate the entire election

and that a writ of mandamus to compel the lower court to try the case immediately could not properly be issued when no formal request first had been made to the trial court. The Court dismissed the Petition for Writ of Mandamus on November 19, 1985, thereby also disposing of the "notice" requirement.

Throughout these proceedings Appellees Patsy Mink and Marilyn Bornhorst had been initimately involved although not as named parties. On November 20, 1985, Mink and Bornhorst filed an "Emergency Petition for Writ of Mandamus." Unlike the Democratic Party, Mink and Bornhorst did not seek a writ directed to the trial court to have it decide the charter interpretation issue which was then pending before it. Instead they ignored the pending trial court action and asked the

Hawaii Supreme Court to interpret the City Charter so as to read into it an implicit ban on recalled officials running for the office from which they were recalled during the unexpired portion of their original term.[2] Petitioners then asked the Court, based upon the brand new interpretation of the City Charter to issue a Writ of Mandamus ordering Pua to delete the names of Pacarro and Matsumoto from the ballots for the special election which was then scheduled to be held on Nov. 30, 1985.

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[2] The statutory interpretation urged by Appellees was not that which ultimately was adopted by the Hawaii Supreme Court. As is discussed below, at the time of the argument the Court created a different theory altogether and then adopted it a half hour later.

On November 26, 1985, the Supreme Court granted their petition, although for a reason completely different thant that raised in the brief.

On December 2, 1985 Appellants returned to U.S. District Court where they were Plaintiffs in the still pending action originally filed on August 12, 1985 in which the constitutional issue had first been raised in the context of a two year ban on running for any City office after recall. (Matsumoto et al. v. Pua et al., Civil No. 85-0950). Relying on England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1965), Matsumoto and Pacarro filed a motion for partial summary judgment on the question of the constitutionality of the new interpreted-into-existence city charter ban against

Matsumoto and Pacarro running for city council in the special election. After an expedited hearing the morning of December 4, 1985 Judge Harold Fong of the U.S. District Court issued his "Order Denying Motion for Partial Summary Judgment", App. A-24 -A-27. The District Court held that it lacked jurisdiction to decide the constitutional question because the Court felt the Hawaii Supreme Court had addressed the constitutional issue "either expressly or sub silentio". Since the written decision of the Hawaii Supreme Court wasn't filed until late that same afternoon, the District Court didn't actually know the rationale for the Hawaii Supreme Court's decision. In the District Court's view, notwithstanding England, Matsumoto's

and Pacarro's only remedy was a direct appeal to this Court.

In an abundance of caution, Appellants elected to proceed simultaneously in both this Court and the U.S. Court of Appeals for the Ninth Circuit. In its Order filed December 12, 1985, the Ninth Circuit Court declared that the district court had not erred in its jurisidictional interpretation. App. A-28 - A-29.

THE QUESTIONS RAISED BY THIS DIRECT APPEAL ARE SUBSTANTIAL

I. THE INTERPRETED-INTO-EXISTENCE BAN ON RUNNING IN THE SPECIAL ELECTION VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

By this appeal Messrs. Matsumoto and Pacarro seek a determination by this Court that the Hawaii Supreme Court's interpre-

tation of the City Charter results in a constitutionally impermissible infringement upon the rights of Matsumoto and Pacarro to be candiates for the City Council and also violates the First Amendment rights of the electorate, their supporters. Alternatively this appeal seeks a determination by this Court that the U.S. District Court for the District of Hawaii has jurisdiction to decide the constitutionality of the interpreted-into-existence ban on appellants running for City Council. This is a classic case of the exception to the general rule that actual controversy must exist at the stage of appellate review. This candidacy case is truly "capable of repetition, yet evading review" Roe v. Wade, 410 U.S. 113, 125 (1973);

Southern Pacific Terminal Co. V ICC, 219 U.S. 498, 515 (1911).

As will be seen, this appeal presents in as pure and clean a factual and procedural context as possible the following question of candidate ballot access never before decided by this Court which impacts directly upon, and if resolved by this Court will provide needed guidance to, every state and municipality which permits recall elections:

> When an official has been recalled in a recall election prompted only by a change in the official's political party affiliation (not by any misfeasance or malfeasance in office - i.e. a no-fault or "for no cause" recall), can the official constitutionally be barred from running in the special election called to fill the vacancy created by the recall?

This appeal also will give this Court the opportunity to flesh out its holding in

Anderson v. Celebrezze, 460 U.S. 780 (1983). In that decision this Court called for a balancing test to judge the constitutionality of candidate ballot access restrictions. The second step of the balancing process requires the government to identify the precise governmental interests which justify the imposition of the restriction. Neither the government nor any other litigant iden ified any governmental interest which justified the absolute prohibition against Appellants Toraki Matsumoto and Rudy Pacarro running in the special election. The Hawaii Supreme Court sua sponte did so in its opinion. App. A-12 » A-13.

This Court has decided that the right to run for office is not a fundamental one. Bullock v. Carter 405 U.S. 134, 142-143

(1972); Clements v. Fashing, 457 U.S. 957, 963 (1982). However, the right to equal access in voting is a fundamental right, Harper v. Virgina State Board of Election, 383 U.S. 663 (1966); and candidacy restrictions implicate First Amendment rights of voters as well as of candidates. Lubin v. Panish, 415 U.S. 709, 716 (1974), Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983). A restriction on candidacy may therefore heavily burden the fundamental right to vote. Lubin v. Panish, 415 U.S. 709, 716 (1974).

> The exclusion of candidates from the ballot infringes on the voters' freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like minded citizens.

Anderson v. Celebrezze, 460 U.S. 780, 788-89

(1983). The Anderson case is the most recent decision by this Court touching on the constitutionality of restrictions on candidate access to the ballot. In that case this court announced a three part "balancing test" to be used to determine the constitutionality of restrictions on a candidate's access to the ballot:

1. Consider the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights caused by the restriction.

2. Identify and evaluate the precise interests put forward by the state to justify the restriction and determine the legitimacy and strength of those interests.

3. Consider the extent to which those interests make it necessary to burden the potential candiate's rights.

A. CHARACTER AND MAGNITUDE OF INJURY

In their Opinion, App. A-11, the Hawaii Supreme Court addressed the first part of the Anderson test and concluded,

> ...it seems clear to us that there is virtually no character or magnitude to the asserted injury to their rights that respondents Matsumoto and Pacarro seek to assert. They ran for office knowing they were subject to recall.

The Hawaii Supreme Court seems seriously to be suggesting that somehow one waives the right to contest the constitutionality of a statute if they are aware of its before they run for office. Obviously appellants knew of the recall provisions when they ran for office, but whether or not they knew they could be recalled is not the issue. When they ran for City Council neither they nor anyone else suspected that the Hawaii Supreme Court would interpret the word "successor" in

section 3-105(b) of the Charter so as to preclude a recalled official from running in the special election. But knowledge of a prohibition on running for city office after a not the issue. The issue is whether or not a ban on running for office after a "no-fault" recall injures appellants. Running for office even with knowledge of the existence of a ban on running after recall does not mean there is no injury if an unconsitutional ban is enforced. Whether or not Appellants knew they could be recalled is simply irrelevant to whether or not a ban on running for an office after recall is unconstitutional. The Hawaii Supreme Court seriously takes the position that the degree of injury to one's constitutional rights is related to the amount of forewarning one has.

The contention is irrational. It is nothing more than a post hoc rationaliazation in an effort to justify the Court's decision in light of the Anderson tests.

Is not a complete ban on running in an election, whether special, primary or general, about as far as government can go in restricting one's access to the ballot? By definition is that not an injury of the most serious character and of the greatest magnitude possible to the candidate and to rights of the voters?

B. IDENTIFY AND EVALUATE THE PRECISE INTERESTS PUT FORWARD BY THE STATE TO JUSTIFY THE BALLOT ACCESS RESTRICTION

The Hawaii Supreme Court's efforts to rationalize its decision into compliance with the second part of the Anderson balancing

test fares no better. This part of the Anderson balancing test requires the Court to identify and evaluate the precise interests put forward by the state (or in this case City Clerk Pua or Petitioners Mink and Bornhorst) to justify the restriction on Appellants' access to the ballot.

In accordance with Rule 13.1 of the Rules of the Supreme Court of the United States, Appellants have requested the Clerk of the Hawaii Supreme Court to certify and transmit the entire record before the Hawaii Supreme Court. Nowhere in that record will this Court find any governmental interest advanced by any of the parties to justify the imposition of a prohibition on Appellants running in the special election. Instead, the Hawaii Supreme Court in its opinion sua

sponte conjured up governmental interests which the Court felt might constitutionally legitimze its "interpretation" of the Charter. Seeing as how these "interests" emerged for the first time in the opinion of the Hawaii Supreme Court, the decision of that Court should not be given res judicata effect since Appellants never had a full and fair opportunity to litigate the validity of these "governmental interests". See, Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985). The decision of the Hawaii Supreme Court concerning these "governmental interests" having been rendered sua sponte without affording Appellants an opportunity to be heard with respect to such interests denied Appellants their procedural due pro-

ss rights. Robinson v. Ariyoshi, 441 Supp. 559, 580 (D. Haw. 1977) affirmed in elevant part, 753 F.2d 1468, 1471-1473 985); Sotomura v. County of Hawaii, 402 Supp. 95, 99 (D. Haw. 1975). The procedu- l due process implications of the Hawaii preme Court's creation of "governmental terests" to justify its decision where none ere advanced by the litigants, should alone rrant reversal or at least make it clear hat the U.S. District Court has jurisdiction decide the constitutional question after he parties have had an opportunity to liti- ate the issues.

Upon examination, the merits of the precise interests" created by the Hawaii preme Court to justify its decision fail to tand up under even casual scrutiny. The

first such "interest" ". . . is to give the citizens a right by a majority vote to recall councilmen for whatever reason the citizens may deem appropriate." App. A-12. The Hawaii Supreme Court is confused. Being able to run in the special election in no way infringes upon the citizens' right to recall. The recall election was held, and Appellants were recalled. That process was over. Being able to run in the special election to fill the vacancy after the recall doesn't affect the recall itself one way or another. The only purpose of recall is to recall and it is not necessary to inflict punishment on those who lose a "no-fault" recall election in order to effectuate that purpose.

This is not a term limitation case.

Clearly limitations on the number of terms one can hold an office are constitutionally permissible. However in this case there is no distinction whatsoever between appellants and every other registered voter in their districts, each of whom could run for city council, except that appellants lost an election. The electorate exercised their right of recall, and a prohibition on running in the special election is analytically irrelevant to the exercise of the right to recall.

The Hawaii Supreme Court goes on to suggest in this connection: "If respondents Matsumoto and Pacarro could run again, the people would be required to reject them twice in order to have them out of office for the remainder of the term from which they were recalled." App. A-12 - A-13 (footnote omit-

ted). That argument assumes appellants would lose the subsequent election. What important governmental interest is there in denying the voters the opportunity to decide whether or not they want appellants back in office in preference to all the other candidates now that they see the alternatives available?

Although said in reference to the two year ban, the words of the Ninth Circuit on this point are equally applicable to the interpreted-into-existence ban at issue here:

> The City Charter does not require a showing of malfeasance in office to initiate recall election. Indeed, all parties to the present action agree that the three councilmen were removed from office by an announced change in political philosophy, not any mealfeasance in office. It is highly doubtful that political processes are in any way advanced by preventing an officeholder who is removed from office by a vote of

> the people because of an unpopular decision from seeking any elective office for two years. Public views of issues and candidates change. The elective process is designed to reflect the changing views of the people.

75 F.2d at 1397 (emphasis added). What the Hawaii Supreme Court really seems to fear is the possibility that a recalled official might win the special election by a plurality. By law, a plurality is all it takes to be elected, and with the large number of candidates running in the special election it is likely that whether or not appellants run, the winner will be by a plurality vote. What is the important governmental interest in preventing Appellants from being elected by a plurality? To suggest that the government has an interest in denying the electorate an opportunity to vote for Appellants in the

special election because appellants might get elected makes no sense.

The Hawaii Supreme Court next suggests that their interpreted-into-existence ban is a general one which also applies to those who resign or are impeached and somehow that constitutes a governmental interest. App. A-13. But is the purpose of a ban on running for office after a no-fault recall in any sense the same as a ban on running after impeachment? Obviously not. The need for a ban on impeached officials running again for the same office is obvious.[3] The need for such a ban when an official resigns from office is dubious. However, assuming that a ban on an impeached official running again is

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[3] The Charter does not contain such a ban. See App. A-39 - A-41.

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essary, that doesn't justify (or more rectly, make constitutional) a ban on an icial who is recalled in a "no-fault" ction from running for the office again. ike impeachment which is a judicial deci- n, a no-fault recall is, after all, only a itical decision by the electorate. There no justification possible for punishing ellants merely because they lost an elec- n which was purely a political event.

If the interpreted-into-existence ban on ning is so broad that its dragnet includes an on running after no-fault recall, her the whole "general" provision is void at least as applied to Appellants it must void for being overbroad.

Finally, the Hawaii Supreme Court

suggests that a ban on Appellants' running:

> "...is necessary to accomplish the Revised Charter's purpose of letting the citizens decide whether or not to recall a councilman. The process of recall by a majority and reelection by a plurality which respondents urge, could, given the time limitations expressed in Section 12-103 of the Revised Charter. . . be repeated several times during the second and third years of councilman's four year term"

App. A-13 - A-14. The first sentence just quoted is no more than a restatement of the Court's previous "interest": ". . . the interest of the City and County as expressed in the Charter, is to give the citizens a right by a majority vote to recall councilman for whatever reason the citizens may deem appropriate." App. A-12. The argument becomes no more logical or compelling by being repeated. Recall is one thing, the special election is another. Holding a

special election in no way interferes with the holding of the recall election. A ban on Appellants running in the special election has no effect one way or the other on the conduct or outcome of the recall election.

As for the second sentence quoted above, the argument is specious. The reality is that the two year ban would have prevented too frequent recalls/special elections. However, with the enforcement of the two year ban being enjoined because of its apparent unconstitutionality, the problem of too frequent recall only arises because of the statutory "gap" created by the deletion of the two year ban. The remedy is to close the gap legislatively, not to use the existence of the gap resulting from the unenforcabiltity

of an unconstitutional provision to justify the judicial imposition of still another ban.

Moreover, assume that someone other than the recalled official is elected in a special election in the second or third year of a term, nothing in the Charter would prevent the immediate recall of the newly elected councilperson or of their "successor" and so on for the next two years. Thus the same speculative problem of repeated recalls posed by the Hawaii Supreme Court in an effort to justify its decision would exist whether or not Appellants can run in the special election.

II. THE HAWAII SUPREME COURT'S CHARTER INTERPRETATION CONTRAVENES THE INJUNCTION ISSUED BY THE U.S. DISTRICT COURT

Section 3-102 of the City Charter provides:

> The Council shall consist of nine members... The terms of office of councilman shall be four years beginning at twelve o'clock meridan on the second day of January following their election. (Emphasis supplied).

The recall provisions of the City

rter Sec. 12-103, provide, in part:

> If a majority of the registered voters who vote on the question at a recall election shall vote "Yes," the elected officer shall be deemed recalled and removed from office, otherwise he shall remain in office. (Emphasis supplied).

Democratic Party, in the proceedings in

U.S. District Court, in the action it

ed in the state trial court and also in

unsuccessful petition for writ of manda-

to the Hawaii Supreme Court as well as

itioners Mink and Bornhorst in their suc-

sful Petition for Writ of Mandamus which

to this appeal all argued that these two

charter provisions should be interpreted to mean that if one is recalled from office, the recall is for "the term of the office", and therefore the recalled official cannot run again for the office from which he or she was recalled for the unexpired balance of the original term of that office. All of the cases cited by the Democratic Party, Mink and Bornhorst in support of such an interpretation dealt with removal for cause, not a no-fault recall. This Court should have it firmly in mind that this interpretation of the Charter was the one which was raised, briefed and argued by Petitioners Mink and Bornhorst, and therefore it was the only one to which Appellants responded. It is important for this Court to understand that the

Hawaii Supreme Court interpreted the statute on an entirely different basis, one of its own manufacture which was entirely different from that argued by Appellees Mink and Bornhorst in their petition and which had never been briefed by any of the parties.

As discussed supra, the Hawaii Supreme Court also created on its own "governmental interests" to try to justify constitutionally its interpretive ban on Appellants running in the special election. The Hawaii Supreme Court has often been called to task for deciding matters on a basis not before it without giving the litigants a chance to address the basis for its decision. In Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985) the Ninth Circuit Court of Appeals refused to give res judicata effect to a Hawaii Supreme

Court conclusion where the complaining party did not have a full and fair opportunity to litigate the claim in state court, citing Haring v. Prosise, 462 U.S. 306 (1983). In an earlier decision in the same controversy the Hawaii Supreme Court rendered a decision sua sponte on an issue as to which the parties had never been given an opportunity to be heard. The U.S. District Court for Hawaii found this to be a denial of procedural due process. Robinson v. Ariyoshi 441 F.Supp. 559, 580 (D.Haw. 1977):

> The state court violated not only its own rules, but the state law as well, by deciding the case on issues that were never raised or argued.

In Sotemura v. County of Hawaii, 402 F.Supp 95 (1975) the Hawaii Supreme Court in its opinion formulated a new presumption of law

concerning the location of seaward property boundaries not raised by the litigants. Because the Court neglected to allow the parties to address the new presumption, the U.S. District Court found that where the parties were never afforded an opportunity to contest the new presumption of law by the presentation of argument and evidence, the Hawaii Supreme Court had "transgressed the due process clause of the Fourteenth Amendment" id at 99, citing Brinckerhoff-Faris Co. v. Hill, 281 U.S. 673, 677-81 (1930).

The idea of construing the word "successor" in Section 3-105(b) of the Charter never arose until oral argument when out of the the blue Justice Padgett asked the meaning of the word "successor". Section 3

105(b) of the Charter, (App. A-34), provides in relevant part:

> A vacancy in the office of any councilman shall be filled in the following manner:
>
> * * *
>
> (b)... At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. (emphasis added)

Justice Padgett seized upon the use of the word "successor" in Section 3-105(b) as necessarily meaning that one can never succeed himself or herself, and therefore Matsumoto and Pacarro could not run in the special election to fill the vacancy created by their recall. Two points need to be made. First, if the issue of the meaning of "successor" in the Charter had arisen in the pleadings, Appellants would have had an opportunity to research and brief the matter.

Appellants would then have been able to point out to the Court that the language of section 3-105(b) of the Charter was carried over unchanged from the 1959 Charter which had no recall provision at all for city councilmen. This indicates that the use of the term "successor" was never originally intended to apply to recall. Appellants also would have been able to point out a definition in Black's Law Dictionary, (4th ed.) which would support a less restrictive interpretation than the definition from Black's used by the State Court:

> successor: one who has been appointed or elected to hold an office after the term of the present incumbent.

The point is, with the Court deciding on a basis not raised or briefed, Appellants cannot be said to have been given procedural due

process.

The second and more important point is that when the Charter was written and adopted, what the electorate intended was clearly stated in the two year ban found in Sec. 12-103: A recalled elected official could not run for a city office for two years after being recalled, whether the election was a general, primary or special election and regardless of the office sought. Since that clearly was the intention, even if the word "successor" as used in Section 3-105(b) of the Charter has the restricted meaning found by the Hawaii Supreme Court, the use of the word "successor" reflects no more than linguistic consistency with the assumption that a recalled official would not be running

again for City office for two years. However because of the constitutional infirmities of the two year ban, its enforcement was enjoined.

It is important to keep in mind that the state statutory interpretation question referred to by the U.S. District Court and the Ninth Circuit was not the same interpretation as that which the Supreme Court itself devised as the basis for its decision. For the Hawaii Supreme Court to seize upon the use of the word "successor" in Section 3-105(b) to create a new ban on running when that word merely reflects an assumed state of affairs resulting from the two year ban, the enforcement of which has been enjoined, is no more than an end run around the preliminary injunction issued by the U.S. District Court.

Since it de facto contravenes that injunction, the Hawaii Supreme Court's order should be overturned.

III. IN THE ALTERNATIVE, THE DISTRICT COURT PROPERLY HAS JURISDICTION TO DECIDE THE CONSTITUTIONAL QUESTION

Although this case is not technically an abstention case, the practical effect of all of the proceedings to date is the same. The usual abstention case involves a federal court challenge to a state statute on constitutional grounds with the federal court abstaining to allow the plaintiffs to file an action in state court first to obtain an interpretation of the statute which might avoid constitutional infirmities. This Court's holding in Government Employees v. Windsor, 353 U.S. 364 (1957) requires that

the federal constitutional implications be raised in the state court proceedings so that the statute will be construed ". . . in light of the constitutional objections. . . " id at 366. Following the state court decision, unless the plaintiffs go beyond Windsor and "fully litigate" the federal constitutional issue in state court, as the court held in England v. Medical Examiners, 375 U.S. 411 (1964), Plaintiffs have an absolute right to return to federal court to litigate the federal constitutional questions in light of the state court's interpretation of the statute.

In this case, Matsumoto and Pacarro on August 12, 1985 filed an action in federal court challenging the constitutionality of the two year prohibition on running for city office after being recalled. The two year

ban found in Section 12-103 of the charter was the only charter provision explicitly preventing them from running for city council in the forthcoming special election. The Ninth Circuit found the two year ban to be so constitutionally suspect that its enforcement was ordered to be enjoined. Matsumoto, et al. v. Pua et al. 775 F.2d at 1397-98.

On at least five separate occasions both in the U.S. District Court and in the Ninth Circuit the Democrats urged the same construction of the charter which Mink and Bornhorst sought in an effort to prevent Matusmoto and Pacarro from running in the special election. Both federal Courts declined to address the argument noting that it was a state law question and in any event the

charter was required to be interpreted "as it was written, not as it might have been written." Id., 775 F.2d at 1397. At that point in time Matsumoto and Pacarro were on the ballot and were quite content to go through with the election. Therefore unlike the usual abstention case there was not formal abstention followed by plaintiffs bringing an action in state court. Instead there was refusal of the federal courts to entertain the Defendants' proferred interpretation followed by the Defendants bringing an action in state court. When they failed to obtain interlocutory relief in the trial court, the Democratic Party unsuccessfully sought a Writ of Mandamus to compel the lower court to have an immediate trial on the merits. When the Democratic Party failed, their privys, Appel-

lees Mink and Bornhorst tried again this time seeking a writ directed to city clerk Pua to delete the names of Matsumoto and Pacarro from the ballot.[4] In their memorandum in support of their Motion to Dismiss the Petition Appellants pointed out and explained why the charter construction proposed by Mink and Bornhorst would violate the First and Fourteenth Amendments to the U.S. Constitution. Government Employees v. Windsor, 353 U.S. 364 (1957) requires a litigant to inform the state court "what his federal claims are, so that the state statute may be construed 'in light of' those claims". England v. Medical

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[4] That a Writ of Mandamus does not lie to undo what has already been done or to reverse discretion already exercised was simply ignored by the Hawaii Supreme Court when they granted the writ.

Examiners, 375 U.S. at 420 explaining the holding in Windsor. That was done. Since the constitutional issue was not raised anywhere in the case in chief and was not in any sense a part of the case in chief as conceived and filed by the Pettioners themselves, no explicit reservation of the right to fully litigate the federal constitutional question in the pending federal action seemed necessary. In any event, "Such an explicit reservation is not indispensable. . . ." England v. Medical Examiners, supra, 375 U.S. at 421:

> [T]he litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. (Emphasis added; footnote omitted).

Although not an abstention case, it seems that the logic and holdings of England and Windsor dictate that since the federal constitutional objections were not "fully litigated" in the state court action which was, after all, a summary proceeding for writ of mandamus, Appellants Matusmoto and Pacarro may fully litigate those issues in U.S. District Court in their already filed and pending action.

If the constitutionality of Sections 3-102 and 3-105 as interpreted by the Supreme Court was specifically at issue and had been fully briefed and argued by the Parties, including the City Clerk and Republican Party Intervenor and decided by the Hawaii Supreme Court, the District Court would not have subject matter jurisdiction over the issue.

District of Columbia v. Feldman, 460 U.S. 462 (1983); Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985). However, as the Ninth Circuit noted in Robinson, supra, at 1471-72 wherein the Federal Appellate Court examined an Hawaii Supreme Court decision:

> However, Rooker [Rooker v. Fidelity Trust Co., 263 U.S. 415 (1923)] made it clear that the only constitutional questions arising from a state proceeding on which the Supreme Court considered itself to be the final arbiter, were those that 'actually arose in the cause' in which a full hearing was held and where the judgment was responsive to the issues. ... Otherwise if Rooker were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, Rooker would swallow the 'full and fair opportunity to litigate' limitation to res judicata clearly established elsewhere by the Supreme Court.
>
> No full and fair opporutunity to

litigate the federal constitutional claims was provided to the parties in the truncated writ proceedings. As commented upon favorably by this Court in Robinson, supra, 753 F.2d at 1472:

> [T]he Restatement of Judgments... provides for an exception to the general rule of preclusion where '[a] new determination in quality or extensiveness of the procedures followed in the two courts...'Restatement (Second) of Judgments Sec. 28(3)> (Emphasis added).

An emergency writ couched solely in state law terms, responsive pleadings by City Clerk and Republican Party addressing the state law issue, notification to the State Court by Plaintiffs of the federal constitutional claims, order granting the writ by court solely addressing the charter provisions show the difference in quality and extensiveness

of procedure which should be accorded these serious federal claims.

If Appellants had not raised the federal constitutional problems b fore the Hawaii Supreme Court, to allow that court to interprete the statute in light of those objections, Windsor would require a remand for that purpose. However, since Appellants did raise the constitutional objections and the Hawaii Supreme Court interpreted the statute "in light of" those objections, it should not be, as the U.S. District Court seems to think, that Appellants only remedy is a direct appeal to this Court.[5] What

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[5] This procedural whipsaw seems to be exactly what this Court sought to avoid in its decision in England v. Medical Examiners 375 U.S. 411, 418 when this Court said:

. . . litigants shunted from federal

happened is exactly what Windsor requires and under such circumstances England is clear that Appellants have a right to return to Federal Court.

> Thus mere compliance with Windsor will not support a conclusion, much less create a presumption, that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court.

England, 375 U.S. at 420. This Court already has acknowleged that "There are fundamental objections to any conclusion that a litigant who has properly invoked the jursidiction of a Federal District Court to consider federal

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Footnote 5 (cont.) to state courts by application of the abstention doctrine will not be exposed... to procedural traps operating to deprive them of their right to a District Court determination of their federal claims."

constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." England 375 U.S. at 415.

CONCLUSION

Appellants urge this Court to recognize the "governmental interests" created by the Hawaii Supreme Court to justify its decision in terms of the Anderson balancing test for what they are: after the fact, shallowly focused, insubstantial, circular and utterly unconvincing.

The Hawaii Supreme Court has interpreted-into-existence a complete ban on Appellants running the special election. A complete ban on running for an office is as

substantial a restriction on ballot access as there can be. Accordingly a rather compelling state interest is necessary to justify the restriction. See, Consumer Party v. Davis, 606 F.Supp. 1008, 1019 n.18 (D.Pa. 1985) applying the Anderson test.

> The principal reflected in the Anderson approach is that if a burden on First Amendment associational and voting rights cannot be justified by important state regulating interests, the state regulation is invalid.

Stoddard v. Quinn, 593 F.Supp. 300, 307 n.12 (D.Me. 1984) It would seem that none of the so-called "interests" asserted by the Hawaii Supreme Court are "important" and in some cases upon analysis aren't even logical, much less compelling. Since they are the basis for justifying the Hawaii Supreme Court's interpreted-into-existence ban on Appellants

running in the special election, that ban should be stricken as an unconstitutional infringement on Appellants' and the voters' First and Fourteenth Amendment rights.

Alternatively, Appellants suggest that jurisdiction may properly rest with the U.S. District Court for the District of Hawaii.

Respectfully submitted,

Boyce R. Brown, Jr.
Counsel of Record

George L. Dyer, Jr.
Attorney for Appellant
Republican Party of Hawaii

Cynthia H.H. Thielen
Attorney for Appellants Toraki
Matsumoto and Rudy Pacarro

APPENDIX

IN THE SUPREME COURT OF THE STATE OF HAWAII

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PATSY MINK and MARILYN BORNHORST, in their official capacity as Council members of the City and County of Honolulu, State of Hawaii on behalf of themselves and all other voters of the City and County of Honolulu, Petitioners, v. RAYMOND K. PUA, and RUDY PACARRO, Resondents, and REPUBLICAN PARTY OF HAWAII, Intervenor

No. 10998

(ORIGINAL PROCEEDING)

DECEMBER 4, 1985

LUM, C.J., NAKAMURA, PADGETT, HAYASHI, JJ., AND INTERMEDIATE COURT OF APPEALS ASSOCIATE JUDGE TANAKA IN PLACE OF WAKATSUKI, RECUSED

ELECTIONS - Revised Charter of the City and County of Honolulu - Eligibility of Recalled Councilmen to be Candidates to Fill the Vacancy Created by their Recall.

Under Section 3-105(b) of the Revised Charter of the City and County of Honolulu, councilmen who are recalled are ineligible to run as candidates to fill the vacancy created for their unexpired term by their

recall.

CONSTITUTIONAL LAW - Article I, section 8, Constitution of the State of Hawaii - Revised Charter.

The disqualification, by the Revised Charter of the City and County of Honolulu, of recalled councilmen from running for the vacancies created by their recall, does not violate Article I, section 8 of the Constitution of the State of Hawaii.

SAME - First and Fourteenth Amendments to the Constitution of the United - States - disqualification of recalled councilmen.

The disqualification, by the Revised Charter of the City and County of Honolulu, of recalled councilmen from running to fill the vacancies created by their recall, does not, on application on the balancing test set forth in Anderson v. Celebrezze, infringe upon their rights under the First and Fourteenth Amendments to the Constitution of the United States.

OPINION OF THE COURT BY PADGETT, J.

On Tuesday, November 26, 1985, we issued an order directing respondent Raymond K. Pua, Clerk of the City and County of Honolulu, to take appropriate action pursuant to HRS Sec. 11-117(b) to carry into effect our ruling that respondents Toraki Matsumoto and Rudy Pacarro were disqualified to run in the special election held to fill their unexpired terms as a result of their having been recalled. In that order, we noted that a written opinion would follow. This is that opinion.

Respondents Matsumto and Pacarro were recalled when a majority of voters, voting on the question of their recall at a special election held for that purpose, voted in favor of the recall.

The recall election was held pursuant to Sections 12-102 and 12-103 of the Revised Charter of the City and County of Honolulu.

Section 12-103 provided in part:

> No person who has been removed from his elected office or who has resigned from such office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the City within two years after his removal or resignation.

Pursuant to the direction of the United States Court of Appeals for the Ninth Circuit, the United States District for the District of Hawaii enjoined respondent Pua from refusing, on the basis of the provisions just quoted, to place the names of respondents Matsumoto and Pacarro on the ballot to elect the persons to fill the unexpired terms from which they had been recalled.

The question of whether, under other provisions of the Re-ised Charter, the recalled councilmen were eligible to run in the special election to fill their unexpired terms was not dealt with in the injunction.

When a vacancy in the office of councilman occurs, the special election to fill that vacancy is held pursuant to the provisions of the Revised Charter of the City and County of Honolulu, Section 3-105(b), which provides as follows:

> Vacancy in Office - A vacancy in the office of any councilman shall be filled in the following manner:
>
> . . . .
>
> (b) If the unexpired term is for one year or more, the vacancy shall be filled by special election to be called by the council within ten days and to be held within sixty days after the occurrence of the vacancy. At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. If any special or general election is to be held in the city after thirty days and within one hundred eighty days after the occurrence of the vacancy, then the election shall be held in conjunction with such other election.

The above provision, by its terms, is a general one, providing for the filling of any vacancy, whether resulting from death, disability, resignation, recall,

impeachment or because the councilman has moved out of his district. The key word in that section is the word "successor" and it necessarily must mean the same in all cases of vacancies, no matter how they occur.

The definition of "successor" in Black's Law Dictionary at 1283 (5th ed. 1979) begins:

> One that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession.

In 83 C.J.S. Successor at 770 (1953), it is stated:

> The term "successor" is variously defined as meaning he that followeth, or cometh in another's place; one that succeeds or follows; one who follows another into a position; one who succeeds or takes the place of another; one who succeeds to the rights or place of another; one who takes the place of a predecessor or preceding thing; one who takes the place which another has left, and sustains the like part or character; also, a person who has been appointed or elected to some office after another person.

See also 40A Words and Phrases (1964)

beginning at page 20.

Thus, the usual meaning of the word "successor" is one who takes the place of another. No one has pointed to anything in the Charter, or in the history leading up to the adoption thereof, which would indicate an intention to depart from that oridinary meaning of the word "successor" in Section 3-105(b).

On the other hand, it is difficult to conceive that the Charter was intended to allow, for example, an impeached councilman, or a councilman who had resigned, to run to fill the vacancy created by his or her impeachment or resignation. In such situations, the common sense of construing "successor" to mean what it oridinarily means and thus to bar the impeached or resigned councilman from running to succeed himself or herself is obvious.

We see no reason why the ordinary

signification of the word "successor" should not be used with respect to one who fills a vacancy created by a recall election. A recalled councilman, by the special recall election, has had one opportunity to have the question of his or her continuance in office voted upon by the people. We find no evidence, in the Charter, of an intention to give him or her a second.

Respondents Matsumoto and Pacarro contend that our construction of the Revised Charter violates Article I, section 8 of the Constitution of the State of Hawaii, which provides:

> No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

Clearly, Matsumoto and Pacarro have not been disfranchised by the provisions of the Charter.

State and local governments have

obvious and legitimate interests in provisions limiting an office holder's right to reelection or reappointment. Thus, for example, we have a constitutional provision which limits the number of consecutive terms a governor may serve. Article V, section 1, Constitution of the State of Hawaii. We also have statutory provisions which limit the number of years an appointee to administrative boards may serve. HRS Sec. 26-34. The persons who take office, knowing of those requirements and accept them, are subject to such requirements. They thus are not deprived of any of the rights or privileges secured to other citizens except by the law of the land.

Respondents Matsumoto and Pacarro also argue that our construction of the Charter is contrary to the First and Fourteenth Amendments to the Constitution of the

United States under Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

In that case a third party candidate, for President of the United States, did not get his papers filed with the proper Ohio officials by a March deadline. Under that statute, major party candidates did not have to file at that early date.[1]

In that case, the Supreme Court of the United States said:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from

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[1] The majority opinion in Anderson noted that the State's interest in political stability was adequately vindicated by another statute prohibiting a defeated candidate in a party primary from running as an independent. 460 U.S. at 783, 103 S.Ct. at 1567, 75 L.Ed.2d at 554. That provision is much closer to the Charter provisions of which respondents Matsumoto and Pacarro are complaining than the statute struck down in Anderson.

> invalid restrictions. [Citations omitted.] Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

d. at 789, 103 S.Ct. at 1570, 75 L.Ed.2d at 58.

Applying that test, it seems clear to us hat there is virtually no character or agnitude to the asserted injury to their ights that respondents Matsumoto and Pacarro eek to assert. They ran for office knowing hey were subject to recall. A recall etition was duly circulated, signed and

verified. A recall election was held as provided by statute. They lost by a majority vote of those voting on the issue of their recall. They now seek to be reelected to the office from which they have been vacated, hoping that, because there is no primary election as a forerunner to the special election to fill the vacancy, they may now be elected by a plurality less than a majority and thus vitiate the will of the people expressed in the recall election.

Secondly, the interest of the City and County, as expressed in the Charter, is to give the citizens a right by a majority vote to recall councilmen for whatever reason the citizens may deem appropriate. If respondents Matsumoto and Pacarro could run again, the people would be required to reject them twice in order to have them out of office for the remainder of the term from

which they were recalled.[2] Moreover, the provision with respect to vacancies is, as we have pointed out above, a general one and must be construed so as to apply to all vacancies, no matter how created. This adds another interest on the part of the City and County of Honolulu in barring recalled councilmen, along with resigned and impeached councilmen, from running to fill the vacancies created by their disqualification from office.

Thirdly, the disqualification is necessary to accomplish the Revised Charter's purpose of letting the citizens decide whether or not to recall a councilman. The process of recall by a majority and reelection by a plurality which respondents urge, could, given the time limitations

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[2] A provision expressly allowing recalled councilmen to run could have been included in the Charter if that was what was wanted. It was not.

expressed in Section 12-103 of the Revised Charter of the City and County of Honolulu, be repeated several times during the second and third years of a councilman's four-year term.

The people of the City and County of Honolulu adopted the Revised Charter. They had the right to provide for the recall of their elected officials and they likewise had the right, within constitutional limitations, to create thereby a mechanism which would prevent the frustration of that right. This they have done, and their interest in so doing outweighs any possible impingement upon the interests of respondents Matsumoto and Pacarro to run again to fill their own vacancies. We find no constitutional impediment to the enforcement of the Charter provisions as we have construed them.

We therefore hold that a recalled councilman is ineligible to run in the

special election to fill the remainder of his or her unexpired term. Our previous judgment of disqualification stands.

/s/ Herman T.F. Lum
Edward Nakamura
Frank D. Padgett
Yoshimi Hayashi
Harry T. Tanaka

David C. Schutter
(David F. Simons and Janice E. Teramae with him on the petition, Schutter Cayetano Playdon of counsel) for petitioners Mink and Bornhorst

Boyce R. Brown, Jr.
(Mary Blaine Johnston and Cynthia H.H. Thielen with him on the briefs, Brown & Johnston of counsel) for respondents Matsumoto and Pacarro

Ronald B. Mun
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George L. Dyer, Jr.
for the Intervenor Republican Party of Hawaii

NO. 10998

IN THE SUPREME COURT
OF THE STATE OF HAWAII

PATSY MINK and MARILYN BORNHORST, in their official capacity as Councilmembers of the City and County of Honolulu, State of Hawaii, on behalf of themselves and all other voters of the City and County of Honolulu,	ORIGINAL PROCEEDING
Petitioners,	
vs.	
RAYMOND K. PUA, City Clerk, City and County of Honolulu, TORAKI MATSUMOTO, and RUDY PACARRO,	Filed Nov. 26, 1985
Respondents.	
and	

REPUBLICAN PARTY OF HAWAII,

Intervenor.

ORDER GRANTING WRIT OF MANDAMUS

Upon consideration of the petition for writ of mandamus filed herein, the responses thereto, and the arguments of counsel, and the record, the court holds that respondents Toraki Matsumoto and Rudy Pacarro, having been recalled at a duly held election, are disqualified by the provisions of Sections 3-102 and 3-105 of the Revised Charter of the City and County of Honolulu from being candidates to succeed themselves at the special election to fill the remainder of their unexpired terms.

An opinion of the court setting forth

the basis for this holding will follow in due course, but in view of the fact that the election is presently scheduled for November 30, 1985,

IT IS HEREBY ORDERED that respondent Raymond K. Pua, Clerk of the City and County of Honolulu, take appropriate action with respect to said disqualifications pursuant to HRS Sec. 11-117(b).

DATED: Honolulu, Hawaii, November 26, 1985.

/s/ Herman T.F. Lum
Edward H. Nakamura
Frank D. Padgett
Yoshimi Hayashi
Harry T. Tanaka

NO. 10998

IN THE SUPREME COURT
OF THE STATE OF HAWAII

PATSY MINK and MARILYN BORNHORST, in their official capacity as councilmembers of the City and County of Honolulu, State of Hawaii, on behalf of themselves and all other voters of the City and County of Honolulu, Petitioners, vs. RAYMOND K. PUA, City Clerk, City and County of Honolulu, TORAKI MATSUMOTO, and RUDY PACARRO, Respondents. and REPUBLICAN PARTY OF HAWAII, Intervenor.	ORIGINAL PROCEEDING Filed in the Supreme Court of the State of Hawaii on November 27, 1985 at 4:21 p.m.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

CERTIFICATE OF SERVICE

Of Counsel:
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Party of Hawaii

NO. 10998

IN THE SUPREME COURT
OF THE STATE OF HAWAII

PATSY MINK and MARILYN BORNHORST, in their official capacity as councilmembers of the City and County of Honolulu, State of Hawaii, on behalf of themselves and all other voters of the City and County of Honolulu,	)
Petitioners,	)
vs.	)
RAYMOND K. PUA, City Clerk, City and County of Honolulu, TORAKI MATSUMOTO, and RUDY PACARRO,	)
Respondents.	)
and	)
REPUBLICAN PARTY OF HAWAII,	)
Intervenor.	)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Rudy Pacarro, Toraki Matsumoto and the

Republican Party of Hawaii appeal to the Supreme Court of the United States from the Order Granting Writ of Mandamus entered by this Court on November 26, 1985 at 4:30 p.m. interpreting the Charter of the City and County of Honolulu as precluding Toraki Matsumoto and Rudy Pacarro from running for the Honolulu City Council in the special election called to fill the vacancies created by their recall. That Order constitutes a final judgment or decree within the meaning of 28 U.S.C. Sec. 1257.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2). This appeal is from an Original Proceeding for a Writ of Mandamus commenced in the Supreme Court of the State of Hawaii. The clerk of the Supreme Court will be served with a copy of this notice both as the clerk of the Court from whose order or decree the appeal is taken and as clerk of the court possessed

of the record.

DATED: Honolulu, Hawaii, November 27, 1985

/s/ BOYCE R. BROWN, JR.
Attorney for Matsumoto
and Pacarro

/s/ GEORGE DYER, JR.
Attorney for Republican
Party of Hawaii

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TORAKI MATSUMOTO, et al.,	)	CIVIL NO. 85-0950
Plaintiffs,	)	Filed December 4, 1985
vs.	)	
RAYMOND PUA, et al.,	)	
Defendents.	)	

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs' motion for partial summary judgment came on for hearing before this court on December 4, 1985. An expedited hearing was held in order to determine the status of Toraki Matsumoto and Rudy Pacarro and its effect upon the need of the Republican Party to substitute candidates in the special election within the deadline of December 4, 1985 as ordered by the Hawaii Supreme Court. This court, having reviewed the motion and the memoranda in

support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises therein, finds as follows:

On November 26, 1985, the Hawaii Supreme Court granted a writ of mandamus, ruling that Toraki Matsumoto and Rudy Pacarro could not run in the special election, pursuant to sec. 3-105 of the Revised Charter of the City and County of Honolulu. Mink v. Pua, No. 10998 (Hawaii 1985). The plaintiffs argue that this interpretation renders that section of the City Charter unconstitutional as a violation of the plaintiffs' rights under the first and fourteenth amendments.

The plaintiffs further argue that collateral estoppel is inapplicable because the constitutional issues were not ruled upon by the Hawaii Supreme Court. More specifically, the plaintiffs argue that the Hawaii Supreme Court's order does not

address the constitutional issue, and Justice Nakamura's statement during oral argument on November 29, 1985 indicates that the state court would not reach the issue.

This court finds the plaintiffs are in error, and that the constitutional issues were decided by the state supreme court. The plaintiffs briefed and argued the constitutional issues on the Motion for Writ of Mandamus. Accordingly, the Hawaii Supreme Court by its decision must have considered the constitutional issues, either expressly or sub silentio. (No written decision of the Hawaii Supreme Court has been filed as of this date.) Furthermore, Justice Nakamura's alleged statement on November 29, 1985 probably referred to the fact that the relief sought by the plaintiffs was a delay of the election, and that the supreme court need

not review its decision as to the City Charter's constitutionality.

Therefore, the Hawaii Supreme Court has ruled that a municipality may constitutionally bar an elected official who has been ousted from office by recall, impeachment or resignation from succeeding himself in a special election. Whether that decision was correct or erroneous is not for this court to decide. The plaintiffs are barred by res judicata and collateral estoppel from relitigating in this court the same issues which have already been argued. The plaintiffs' proper remedy is by way of appeal to the U.S. Supreme Court.

Accordingly, IT IS HEREBY ORDERED that the plaintiffs' motion for partial summary be and the same is, DENIED.

DATED: Honolulu, Hawaii, December 4, 1985

/s/ Harold M. Fong

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TORAKI MATSUMOTO, et al.,	No. 85-7683
Petitioners,	DC# CV 85-0950-HMF
vs.	District of Hawaii
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII,	Filed Dec. 12, 1985
Real Parties in Interest,	
and	
RAYMOND K. PUA, City Clerk, City and County of Honolulu,	ORDER
Real Parties in Interest.	

Before: KENNEDY, HUG and SKOPIL, Circuit Judges

Plaintiffs' emergency petition for a writ of mandamus is denied. Mandamus review is inappropriate because the district court order denying partial summary judgment is appealable as a denial of injunctive relief under U.S.C. Sec.

1292(a)(1). Moreover, the district court did not err by holding that the Hawaii Supreme Court decision collaterally estopped plaintiffs from relitigating the constitutionality of a limited prohibition against city councilmen running to fill the vacancies created by their own recall from office. Plaintiffs briefed this issue in the state court without reserving their right to return to federal court, and the Hawaii Supreme Court expressly held that the limited prohibition did not violate the federal constitution. See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421-22 (1964).

CONSTITUTION, STATUTES, ORDINANCES

U.S. CONST. AMEND. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercies thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. XIV, ART. I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.

28 U.S.C. Sec. 1257:

Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

42 U.S.C. Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REVISED CHARTER OF THE CITY AND COUNTY OF HONOLULU 1973 (1983 EDITION):

Section 3-102. Number, Election and Terms of Office of Councilmen - The council shall consist of nine members. One member shall be elected from each of the nine districts hereinafter provided. The terms of office of councilmen shall be four years beginning at twelve o'clock meridian on the second day of January following their election.

. . .

Section 3-105. Vacancy in Office - A vacancy in the office of any councilman shall be filled in the following manner:

(a) If the unexpired term is less than one year, the remaining members of the council shall elect a successor with requisite qualifications to fill the vacancy for the unexpired term. Vacancies shall be filled only at a regular meeting of the council after reasonable notice of

intent to fill the vacancy has been given to all remaining members of the council by the presiding officer. Should the council fail to fill any vacancy within thirty days after its occurrence, the mayor shall appoint a successor to fill the vacancy for the unexpired term.

(b) If the unexpired term is for one year or more, the vacancy shall be filled by special election to be called by the council within ten days and to be held within sixty days after the occurrence of the vacancy. At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. If any special or general election is to be held in the city after thirty days and within one hundred eighty days after the occurrrence of the vacancy, then the election shall be held in conjunction with such other election.

. . .

Section 12-102. Recall of a District Councilman - A district councilman may be removed by recall which shall be initiated upon petition signed by registered voters equal in number to at least ten percent of the votes cast in his district at the last preceding city general election.

Section 12-103. Recall Petition; Recall Election - Each elector signing a recall petition shall add to his signature his address, his council district and the date of signing. Signatures on a recall petition may be on separate sheets but each sheet shall have appended to it the affidavit of some person, not necessarily a signer of the peittion, that to the best of affiant's knowledge and belief the persons whose signatures appear on the sheet are registered electors of the city, that they signed with full knowledge of the contents

of the pecition, and that their residences are correctly given.

A recall petition shall be tendered for filing with the city clerk. The clerk shall examine it to see whether it contains a sufficient number of apparently genuine signatures of registered voters. The clerk may question the genuiness of any signature or signatures appearing on the recall petition and if he finds that any such signature or signatures are not genuine, he shall disregard them in determining whether the petition contains a sufficient number of signatures. He shall also disregard any signature dated more than sixty days before the petition was tendered for filing. The clerk shall eliminate any sheet of the petition which is not accompanied by the required affidavit. The invalidity of any sheet of the petition shall not affect the validity

of the petition if a sufficient number of signatures remains after eliminating such an invalid sheet. The clerk shall complete his examination of the petition within fifteen days after the submission of the petition to him and shall thereupon file the petition if valid or reject it if invalid.

As soon as the clerk has accepted a recall petition for filing, he shall notify the elected officer that the petition has been filed. Upon receipt of such notice, the elected officer may resign from his office and thereupon the recall proceedings shall terminate.

If the elected officer does not resign from his office within ten days after notice of the filing of such petition shall have been given to him, the clerk shall arrange a recall election. If a general or special city or State election is to be held not less than thirty days nor more

than ninety days after the ten days have expired, the recall question shall be placed before the electors at such an election. Otherwise a special recall election shall be fixed for a date not earlier than thirty days nor later than ninety days after the ten days have expired. The elected officer may resign at any time prior to the recall election and thereupon the election shall not be held.

The following question shall be presented to each elector in a recall election: "Shall (name of elected officer) be recalled and removed from the office of (title of office)?"

If a majority of the registered electors who vote on the question at a recall election shall vote "Yes", the elected officer shall be deemed recalled and removed from office, otherwise he shall remain in office.

No person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment of any office of the city within two years after his removal or resignation.

No recall petition shall be filed against an elected officer within the first or the last year of the term of his office or within six months after an unsuccessful recall election against him.

Section 12-201. Impeachment of the Mayor - The mayor may be impeached for malfeasance, misfeasance or non-feasance in office. The supreme court of the State shall constitute a board of impeachment in any proceeding for the removal of the mayor who may be charged on any of the foregoing grounds. The charges shall be set forth in writing in a petition for impeachment

signed by not less than five hundred qualified electors of the city, and said signatures shall be necessary only for the purpose of filing the petition. The petition having once been filed, hearings shall be held on all such charges. The board of impeachment may appoint a master and invest him with power to investigate the charge and report thereon to the board. If the board sustains the charge, the mayor shall be deemed removed from office.

Section 12-202. Impeachment of a Councilman - Any councilman may be removed for malfeasance, misfeasance or non-feasance in office or for interference with the performance of the duties of any officer or employee in any executive agency of the city government. The supreme court of the State shall constitute a board of impeachment in any proceeding for the removal of a councilman who may be charged

on any of the foregoing grounds. The charges shall be set forth in writing in a petition for impeachment signed by not less than five hundred qualified electors of a district for the removal of a councilman, and said signatures shall be necessary only for the purpose of filing the petition. The petition having once been filed, hearings shall be held on all such charges. The board of impeachment may appoint a master and invest him with the power to investigate the charge and report thereon to the board. If the board sustains the charge, the councilman shall be deemed removed from office.